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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-509

THE SINGER COMPANY,

Petitioner,

against

PERMA RESEARCH & DEVELOPMENT COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Petitioner, The Singer Company (hereinafter "Singer"), files this reply to the "Brief In Opposition" (hereinafter "Opp. Br.") of Respondent, Perma Research and Development Company (hereinafter "Perma"), to Singer's Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit (hereinafter "Pet.") pursuant to Rule 24(4) of the Rules of this Court. Singer offers this Brief in reply to several arguments advanced in the Brief In Opposition which, it is submitted, on analysis can only serve to emphasize the urgent need for this Court to grant Singer's Petition and review the decision below.

ARGUMENT

Perma bases its opposition to Singer's Petition on a misreading of the majority decision below. Perma is simply wrong in contending that the question presented for review to this Court is "abstract", that no important question of federal law is involved and that the majority decision below is not in conflict with decisions of other Circuits.

I.

The Question Presented is Not Abstract; It was Central to the Holding on Both Liability and Damages.

The question presented for review is: did the Court of Appeals commit error in affirming the District Court's admission in evidence, over objection, and reliance upon the results of computer simulations prepared specifically for the purposes of trial where the proponent of the computer simulations refused to disclose the all-important computer program? Perma opens its Brief In Opposition with the argument that this question is "abstract" and "not decided by the court below" (Opp. Br. at 2-3). This contention is absurd.

The trial court held that Singer was liable for failing to successfully perfect and market an automobile anti-skid device invented by Perma. Essential to this holding and to the award of nearly $7,000,000 in damages was the trial court's finding that the device was in fact perfectible and marketable. In support of this finding, the trial judge cited only the opinion of Perma's expert which, as his opinion expressly states, had been offered and received "on the basis of the computer simulations."

Appendix G, p. 82a. As Judge Van Graafeiland stated in dissent, "Plaintiff's [Perma's] entire case rests upon the accuracy of its computerized calculations. . . ." Appendix J, p. 162a.

Singer objected to the admission in evidence of the computer simulations at trial because Perma refused to disclose the computer program (Tr. 3086-89). It moved thereafter to strike the computer simulations on the same ground (Tr. 3880-97). On appeal, Singer contended that it was error for the trial court to admit the computer simulations and to rely upon them in finding liability and damages while denying Singer access to the computer program. The majority below held that it was not. Singer now presents that ruling to this Court as error. The question is hardly "abstract".

Perma's mistaken view may stem from the lip-service given by Mr. Justice Clark to Singer's contention. Although the majority below *said* that it would have been "better practice" to require disclosure of the computer program, it *held* that the trial judge had not erred in failing to do so. Appendix J, pp. 136a-37a.

Thus, the majority below has squarely held that disclosure of the computer program is not a required foundation for admission of computer simulations and that disclosure of the program is not necessary for effective cross-examination (Pet. at 5). Singer submits that this holding is dangerous error and that the question presented is a real one, not only in the case at bar, but for future litigants who, if the decision below is permitted to stand, may be faced with the insurmountable task of combating computerized evidence created specifically for trial without knowledge of the all-important information contained in the computer programs.

II.

This Case Presents an Important Question of Federal Law.

In its Petition, Singer cited eminent authorities, including the *Manual for Complex Litigation* promulgated by the Federal Judicial Center, which have noted the increasing use of computer-generated evidence and have urged that standards be set immediately to avoid the danger of the computer being the vehicle of introducing erroneous, misleading, or unreliable evidence. Appendix J, pp. 158a-59a (dissenting opinion) (Pet. at 6-8). Perma cannot and does not squarely address the importance of the question presented. Rather, it seeks to avoid the issue by mischaracterizing the nature and role of computer programs generally and in the case at bar. Perma's arguments are untenable in either situation.

Perma contends that computer programs are no more than convenient packagings of raw data and basic formulas which "could readily have been reconstructed." (Opp. Br. at 4). This surprising assertion has not been adopted by any court which has heard this case and is belied by Perma's stated reason for refusing to disclose its program —that is, that the program was a valuable and proprietary secret. Appendix J, pp. 157a-58a (Tr. 3088). If the computer program could "readily have been reconstructed" by Singer, what can be so unique about it as to make it a valuable proprietary secret and justify the program's continued concealment by Perma?

Moreover, Perma's assertion that Singer had been given all of the data, information and assumptions necessary to duplicate, verify or understand the computer simulations is devastated by the testimony of Perma's own expert witness who, after admitting that the computer program had not been disclosed (Tr. 3086), testified that "any computer program has got immense amounts of data, you know, internal to it." (Tr. 3797). Perma's expert further testified that the information contained in the computer foundation exhibits (Opp. Br. at 5 n.3) only "represents some of the input data and some computer data that is relevant" (Tr. 2997) and that not all of the logical and mathematical assumptions employed in the computer simulations were disclosed (Tr. 3874-76). It is self-evident that without disclosure of all of the relevant data and all of the logical and mathematical assumptions employed, Perma's admittedly complex computer simulations could not be verified, duplicated or understood by anyone.

In a further effort to avoid the important question of federal law presented, Perma argues that its expert witness based his opinion on "other evidence" in addition to the computer simulations (Opp. Br. at 6). Again, the record is entirely to the contrary. Perma's expert testified that the computer simulations were necessary because the "other evidence" to which Perma alludes in its Brief was "contradictory" and of questionable reliability (Tr. 2637). It was only with the "benefit of hindsight from the computer runs" that Perma's expert was able to opine that "the system could have been made to meet the specifications that we intended for it to meet" (Tr. 2524). And the trial judge put this contention to rest by clearly stating in his opinion that the expert testimony upon which he relied was offered and received "on the basis of the computer simulations" Appendix G, p. 82a (Tr. 2462-63).*

* Perma's reliance on *United States v. Dioguardi*, 428 F.2d 1033 (2d Cir.), *cert. denied*, 400 U.S. 825 (1970), for the proposition that the Petition presents no important question of federal law is astonishing (Opp. Br. at 8). It has always been Singer's position that Judge Friendly's holding in *Dioguardi* that "it is quite incomprehensible that [Perma] should tender a witness to state the results of a computer's operations without having the program available for defense scrutiny and use on cross-examination if desired" is a statement of law of considerable importance which should have been

Perma's final attempt to address Singer's argument that an important question of federal law is presented by this case is its glib assertion that the issue of whether computer-generated evidence prepared specifically for the purposes of litigation is admissible without disclosure of the computer program "is hardly of sufficiently far-reaching importance" to warrant review by this Court (Opp. Br. at 7-8). In sharp contrast to Perma's unsupported assurance, the Federal Judicial Center, the American Bar Association, and eminant commentators have expressed serious concern about the dangers inherent in computer-generated evidence and have urged that appropriate standards now be established to govern its admission. App. J, pp. 158a-59a (dissenting opinion) (Pet. at 6-8, 13).

Singer reiterates that the use of computer-generated evidence will rapidly expand in future years and will be as critical to the determination of future litigations as it was to the case at bar. It is of the utmost importance that this Court, which has recently acknowledged the importance of evidentiary questions through the promulgation of the Federal Rules of Evidence, now establish fair and appropriate standards governing the admission of evidence generated by computer.

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followed in the case at bar. 428 F.2d at 1038. As this Court will note, the judgment in *Dioguardi* was affirmed on the ground that in that case the computer-generated evidence "was a quite unnecessary frill" and was of such a simple nature that it could have been duplicated by anyone who could add and subtract. 428 F.2d at 1039. Neither consideration is applicable to the case at bar.

III.

The Majority Decision Below is in Conflict with Decisions of Other Circuits.

The Fifth, Sixth and Ninth Circuits have held that computer-generated evidence is inherently hearsay and must qualify for exception to the hearsay rule in order to be admitted (Pet. at 12-13). Perma's assertion that there exists no conflict between the majority decision below and the decisions of other Circuits totally ignores these holdings.

The sole basis for Perma's assertion is that actual disclosure of the computer program has not been required in a number of cases. But Perma overlooks the fact that in each of these cases the courts admitted the results of the computer's operations under the exception to the hearsay rule set forth by the Federal Business Records Act. 28 U.S.C. § 1332(a). Furthermore, in each case the courts held that a foundation of reliability and trustworthiness sufficient to avoid the strictures of the hearsay rule had been laid by proof at trial that the computer programs responsible for the results had been used in the normal course of business to maintain business records.

But the computer program responsible for the results of Perma's computer simulations was created specifically for use at trial and is entitled neither to a presumption of reliability and trustworthiness nor to exception to the hearsay rule by operation of statute or judicial precedent. In the case of Perma's unverified computer simulations, which served no purpose other than to provide evidence at trial, a foundation of reliability and trustworthiness and avoidance of the hearsay rule could only have been accomplished by disclosure of the computer program.

The cases cited in the Petition stand for the simple and stark proposition that the proponent of computer-generated

evidence, be it specifically prepared for litigation or not, carries the burden of laying a proper foundation of trustworthiness and reliability as well as the burden of avoiding the hearsay inherent in such evidence. In sharp conflict, the majority below held that the proponent of computer-generated evidence created specifically for litigation need not do so, and shifted to the adverse party the burden of demonstrating why it was unable to cross-examine an out-of-court computer controlled by an out-of-court computer program without disclosure of the information contained within that program.

CONCLUSION

The proper administration of justice and the unanimous views of commentators, lower courts, and the *amicus* underscore the importance of a review of this issue by this Court now.

Respectfully submitted,

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